No. 14564

United States Court of Appeals

For the Ninth Circuit

SEARS, ROEBUCK & CO., a Corporation,
Appellant,

vs.

METROPOLITAN ENGRAVERS, LTD.; METROPOLITAN MAT SERVICE, INC.; GREGORY F. DUFFY, AUBREY A. DUFFY, ALFRED SMUTZ, WALTER C. DUFFY and FRANK R. BLADE,
Appellees.

BRIEF OF RESPONDENTS METROPOLITAN ENGRAVERS, LTD., METROPOLITAN MAT SERVICE, INC.; GREGORY F. DUFFY, AUBREY A. DUFFY, ALFRED SMUTZ and WALTER C. DUFFY.

NATHAN M. DICKER
208 South Beverly Drive
Beverly Hills, California
Attorney for said Respondents

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PRELIMINARY

No question is raised as to the jurisdiction of the court; and the statement of appellant is substantially correct. However, it is to be noted that the alleged conspiracy extended over a period of approximately 15 years; that it involved a vast multiplicity of transactions. (R. 17-28). The period was so long that the plaintiff appears to have no record of the transactions prior to 1942, (R. 17); at least none are set forth in Exhibit "A" upon the page cited, yet it claims that

the conspiracy was entered into in 1937 (R. 6) and continued in active operation until 1951 (Complaint par. VIII, R. p. 9). In paragraph VI of the complaint (R. p. 7) it is alleged that

> ". . . said defendant 'Engravers,' its officers, agents and representatives above mentioned, and each of them, secretly, fraudulently, unfairly and deceptively conspired and agreed that the defendants 'Engravers' and 'Mat Service' would pay to, and the defendant Frank R. Blade would receive and accept secret, fraudulent, unfair and deceptive rebates, profits or commissions in the sum of $400.00 per month in consideration of which said defendant Blade would contract for all engraving to be purchased by the Los Angeles group of stores owned and operated by plaintiff with said defendant 'Engravers' and no other person, firm or corporation, and would permit them to charge and would procure plaintiff to pay them sums of money greatly in excess of the then going price for identical quantities of identical or similar engraving current in the Los Angeles market and at prices substantially in excess of the prices which plaintiff would have been charged by competitors of defendants for like quantities of engraving of like grade and quality."

It is alleged in paragraph X (R. p. 12)

> "That pursuant to the conspiracies and agreements hereinbefore alleged, and in furtherance thereof, the defendants 'Engravers,' 'Mat Service' and their above-named officers, agents and representatives paid to the defendant Blade, and said

> defendant Blade received and accepted from them money as a commission, compensation, allowance and rebate in sums which plaintiff alleges on information and belief to have been in excess of $50,000.00;"

and the complaint concludes with a prayer for $162,001.45 plus interest and the additional sum of $250,000.00 as exemplary or punitive damages.

It is affirmatively alleged in the complaint that the market price during all of the term of the conspiracy for engravings of the like quality or grade was $.030 or less, (Par. VI, R. p. 8), and in paragraph VIII (R. p. 9) it is alleged that the total amount charged by these defendants and paid by plaintiff for engravings from February 6, 1942 to November 29, 1951 was and is the sum of $563,504.50, and that the market price for like quantities of like grade was the sum of $421,524.55 (R. p. 10), and on that page it is alleged that

> "the dates and amounts of the purchases of engravings made by plaintiff from the defendant 'Engravers' during the period of time from on or about January 1, 1937, until on or about February 5, 1942, and the total amount so charged by said defendant 'Engravers' and paid by plaintiff for engravings purchased by plaintiff from said defendant 'Engravers' during said period of time from on or about January 1, 1937, until on or about February 5, 1942, are not now known by plaintiff, although well known by the defendants, and plaintiff begs leave of this Court to amend

its complaint herein to allege such facts and to offer proof thereof as and when ascertained by plaintiff;"

In paragraph XI of the complaint it is alleged that in July 1951 plaintiff received an anonymous letter stating that some unidentified person who was engaged in purchasing for plaintiff was receiving secret payoffs, rebates or commissions (R. p. 13); and the plaintiff further alleges that thereupon it commenced an investigation, and in the course of investigation discovered that Blade had personally received a check in the sum of $400.00 from Metropolitan Mat Service (R. p. 14). As a reason for not making the discoveries sooner plaintiff has nowhere alleged that the fair market price and value of such engravings was not at all times known by it independent of the knowledge possessed by Blades, but it alleges that "the formulas and techniques for computing rates for engraving work of the nature herein involved were matters with which plaintiff had no familiarity or knowledge and concerning which plaintiff was compelled to and did rely upon the knowledge, experience, expertness, loyalty and good faith of its said Advertising Manager, the defendant, Frank R. Blade."

An action was brought by the plaintiff against co-defendant Frank R. Blades in the Superior Court of the State of California, a copy of which is attached as Exhibit "A" to the answer of defendant Blades and appears on pages 38 and 39 of the Record. Upon pages 40-42 appears the affidavit of the Assistant Secretary

of defendant for the attachment, and on page 43-44 is a copy of said writ. A bill of particulars was demanded in that action and is set forth as Exhibit "E" to said answer of respondent Blades on pages 45-47 of the Record. A motion to dismiss was made by these defendants and in support thereof was the affidavit of William J. Clark (R. p. 52-54) in which the facts as to said action in the Superior Court are set forth.

There was a motion to dismiss or for a summary judgment filed prior to the filing of the amended complaint. That motion was granted as to counts I and II and plaintiff was required to amend as to count III. Appeal was taken from the order dismissing the first and second causes of action and never completed. The record, however, is on file, being number 13853 of this court.

In support of that motion was an affidavit of Aubrey A. Duffy which appears upon pages 25-28 thereof, filed for the purpose of showing that evidence that would have been available if the action had been more promptly brought had been lost through the lapse of time. No argument will be made here predicated upon such affidavit, but motion will be made to augment the record by having that affidavit brought up for this Court's consideration.

SUMMARY OF ARGUMENT

These defendants controvert the position of the appellant that appellant has separate and concurrent causes of action by reason of the acts and things done in the course of the alleged conspiracy. Since for the purpose of this appeal the allegations of the complaint must be taken to be true these respondents for the purpose of this appeal only have considered the conspiracy and the fraud arising out of it as actual facts. They contend that a conspiracy is essentially a partnership in crime; that the act of each conspirator is the act of all; that each conspirator is liable for all the acts of his co-conspirators in the course of the conspiracy and for all the effects of such acts. That there is no civil remedy for a conspiracy, but that under the principles stated the conspirators are joint tort feasors.

We contend that there is but a single invasion of one primary right of the appellant by one continuous wrong on the part of the respondents, and that whatever authorities seem to hold to the contrary are not sound in principle and ought not be followed.

We contend that by seeking to recover from one of the co-conspirators the money which he had received out of the conspiracy, and seeking the benefit of an attachment, the plaintiff elected his remedy. We further contend that if, as alleged in the complaint, we had as the result of such conspiracy received the excessive sums alleged in the complaint, that all of such excess might have been recovered in an action *in assumpsit* for money had and received; and that the

plaintiff will not be permitted in one court to sue upon a contract implied in law, and in another court to sue upon the antecedent fraudulent transaction out of which the implied contract arose; that by suing *in assumpsit* the plaintiff waived the antecedent fraud and is estopped thereby.

The other principal contention of these respondents is that not only has the statute of limitations run against the plaintiff, but there has been so great a lapse of time between the inception of the conspiracy and the bringing of the complaint that it would be inequitable and unjust to permit plaintiff at so late a date to maintain its action; that the length of time has been so great as to give rise to a presumption of plaintiff's acquiescence in the transactions. These questions will be discussed under the headings as set forth below.

I.

PLAINTIFF ALLEGES MERELY THE INVASION OF A SINGLE PRIMARY RIGHT BY A CONTINUING WRONG. THERE IS BUT ONE CAUSE OF ACTION.

II.

THE LAPSE OF TIME HAS BEEN SO GREAT AS TO GIVE RISE TO THE PRESUMPTION THAT EVIDENCE HERETOFORE AVAILABLE TO THE DEFENDANTS IS NO LONGER AVAILABLE.

III.

THE QUESTION OF LACHES IS ADDRESSED PRIMARILY TO THE TRIAL COURT AND IN THE ABSENCE OF A SHOWING THAT HE ABUSED HIS DISCRETION, HIS DECISION WILL NOT BE DISTURBED.

IV.

NO FIDUCIARY RELATIONSHIP EXISTED BETWEEN THESE RESPONDENTS AND THE PLAINTIFF, AND THE RULE OF DILIGENCE IS NOT RELAXED IN FAVOR OF PLAINTIFF FOR THAT REASON.

V.

THAT BY THE ACTION IN THE STATE COURT THE PLAINTIFF WAIVED THE TORT AND ELECTED TO SUE UPON AN IMPLIED CONTRACT IS BEYOND QUESTION.

CONCLUSION

ARGUMENT

I.

PLAINTIFF ALLEGES MERELY THE INVASION OF A SINGLE PRIMARY RIGHT BY A CONTINUING WRONG. THERE IS BUT ONE CAUSE OF ACTION.

Counsel for appellant have argued with great plausibility that "Appellant has separate and concurrent causes of action" against its agent for commissions received for its use and benefit and against the third party suppliers for their fraud in overcharging appellant. It is our purpose to show that it has a single cause of action for which it is afforded alternate remedies.

In its complaint appellant has alleged a conspiracy between Blades and these respondents; that it was a part of the conspiracy that respondents should charge more than the current rate for their work or product and that Blades should receive $400.00 per month as the price for his treachery. According to this theory

every $400.00 payment that Blades received was the consideration for overcharges by respondents, or to state it somewhat differently, the aggregate of the overcharges in a given month and the payment of the four hundred dollars for that month were simply different aspects of a single transaction carried on in the course of a corrupt agreement.

Clearly the primary right of the plaintiff was to be free from all and not merely a part of the effects of such agreement. The appellant had a right to the undivided loyalty of its employee. By a violation of that loyalty two things, according to appellant's pleading, occurred: One, Blades received money which although it was paid by respondents, belonged to appellant; the other, respondents received from appellant a sum of money, part of which was proper remuneration for services rendered and part of which was an unjust enrichment—a receipt by fraudulent means of money which in fair faith and good conscience belonged to appellant.

We do not know of any reason why if appellant had so elected it could not have sued for all these respondents received, to use its own language, beyond the "market value" of the engravings under the common counts for money had and receievd. *(Philpott vs. Sup. Ct.,* 1 Cal. 2d 512, 518-523).

What we have said finds support in the language of the amended complaint as it appears on pages 7 and 12 of the record from which we have quoted.

In the language first quoted is a very clear statement that there was a fraudulent conspiracy between Blades and these respondents; that the substance of the conspiracy was that Blades was to receive $400.00 per month of secret profits "in consideration of which" he would procure appellant to pay to respondents "sums of money greatly in excess of the going price for identical quantities of identical or similar engravings." Again we say that both the secret profits and the excessive charges were merely different aspects of the same transaction and that both arose out of the breach of the obligation of loyalty on part of Blades which is very clearly alleged in paragraph V of the amended complaint.

Notwithstanding the authorities cited by appellant, we see no escape from the conclusion that appellant pleaded and intended to plead the breach of that obligation as the primary cause for the action.

In *Frost vs. Witter,* 132 Cal. 421, the court pointed out that an action is simply the right or power to enforce an obligation and this definition has been widely if not universally accepted. "Obligation" may be defined as a duty which one owes to another. It has been defined as a legal duty. (*Crandall vs. Bryan,* 15 How. Pr., N. Y. 48, 53; *Sounesyn vs. Akin,* 12 N. D. 227, 97 N. W. 557, 560-563; *Daube vs. U. S.,* 1 F. Supp. 771; *Goodwin vs. Freadrick,* 280 N. W. 917, 293; *Morgan SS Co. vs. Stewart,* 44 So. 138, 143, 115 La. 392; *Rapides Grocery Co. vs. Clapton,* 129 So. 257; *Colter*

vs. State, 39 S. W. 576, 577, 38 Tex. Cr. App. 284; *Sharon vs. Sharon,* 75 Cal. 1.)

What then was the duty of each co-conspirator other than to restore to appellant all that they together had received through the conspiracy in excess of that to which they were lawfully entitled?

Each conspirator is jointly and severally liable for all the injury resulting from the conspiracy. *(McCandliss vs. Furland,* 296 U. S. 140, 80 L. Ed. 121; *Harriss vs. Indemnity Ins. Co.,* 93 F. 2d 459; *Northern Kentucky Telephone Co. vs. Southern Bell T. & T. Co.,* 83 Fed. 353; 87 A.L.R. 153; *Wells vs. Lloyd,* 6 Cal. 2d 70; *Leavitt vs. Gibson,* 3 Cal. 2d 90, 98; *Mox Inc. vs. Woods,* 202 Cal. 675, 678; *Southern Cal. Iron, Steel & Tin Workers vs. Amalgamated Ass'n of Iron, Steel & Tin Workers,* 183 Cal. 604; *Revert vs. Hesse,* 184 Cal. 95, 302, 303; *Penziner vs. West American Finance Co.,* 133 Cal. App. 578, 1 Am. Jur. 579; *Bowman vs. Wohlhe,* 166 Cal. 121; *Loeb vs. Kimmerle,* 215 Cal. 143.)

In *Revert vs. Hesse, supra,* 184 Cal. at 303, the Court said of defendants Sidney Beach and Orville Hesse, who acted only as trustees or agents for their co-defendant and received no remuneration:

> "Plaintiff's omission to prove that said defendants, Sidney Beach and Arvilla Hesse, received pecuniary compensation is immaterial. Those who aid in the commission of a wrongful act by another are liable for the resulting damages although they expected no benefit from the wrongful act and received none."

(citing *Brumsley vs. Speedway Co.,* 138 Tenn. 534; *Breedlove vs. Bundy,* 96 Ind. 319; *Felsenitral vs. Thieben,* 23 Ill. App. 569.)

Therefore, it is of no importance that none of these defendants received any part of the four hundred dollars per month that the complaint alleges was paid to Blades. Every one of them upon the facts alleged was just as liable to plaintiffs as Blades himself. The money received by Blades was fruit of the conspiracy. It belonged to appellant. All conspirators were liable for it. If we were to assume that the payments to Blades were made for help given outside his hours of employment in arranging the matter to be engraved for the engravers still the money so received would belong to plaintiff.

But that is so because however innocent the transaction, the employee may not receive anything in the course of his employment except his wage or salary. The law prohibits it. The receipt may not be *malem per se.* It may be only *malem prohibitum.*

But here the receipt of the money was as much the fruit of the conspiracy as the payment of the overcharge. Both are parts of the same scheme. Both arose out of the same fraudulent acts. Both are part of the damage sustained by plaintiff. Both were made possible by the same breach of duty. Whatever claim the plaintiff had against Blades, it was founded upon the same obligation out of which arose its claim against these respondents. To establish its claim here it must

prove the same facts that it relied upon in the Superior Court.

Although the Rules of Civil Procedure no longer recognize a cause of action and have done away with the formal pleading necessary to allege one, in their essence a claim for relief and a cause of action are the same. A cause of action is simply an obligation which the law recognizes and the courts enforce. (*Frost vs. Witter,* 132 Cal. 421.) So Rule 8a in providing that a claim for relief shall contain a short and *plain statement of the claim showing that the pleader is entitled to relief* means no less than that the pleading must show an enforceable obligation. And where it shows an unlawful combination through which the plaintiff has not only been defrauded but also that money has come into the hands of one of the conspirators not by means extraneous to the fraud but as part of the fruits thereof, it alleges only one indivisible obligation—only one claim which is entitled to relief. Unless this court is prepared to hold that a claim which is entitled to relief is less than the entire obligation and that what constitutes a cause of action may be split into as many claims as the ingenuity of the pleader can devise, it must hold that only the invasion of one primary right, that is, one obligation or cause of action, has been pleaded both in the state action and here. "The pleading still must state a 'cause of action' in the sense that it must show 'the pleader is entitled to relief.' "

Moore's Federal Practice, Sec. 8.13.

The Rules of Civil Procedure are very largely based on the old equity rules (Barron and Hollszoff Federal Practice and Procedure, page 24) and the spirit of equity jurisprudence pervades them. In his work on Equity Jurisprudence (Section 90, page 119) Mr. Pomeroy uses this language:

> "All the commands and rules which constitute the 'private civil law' create two classes of rights and duties the 'primary' and the 'remedial'. The primary rights and duties form the body of the law; they include all the rights and obligations of property, of contract and of personal status."

He classifies primary rights as "real" and "personal" (Sec. 93, p. 122) and subdivides "real rights" into rights of property, rights of personal security, and rights which certain classes of persons have over other persons *standing in domestic relation to themselves.* (Ibid. Sec. 94). The personal rights he considers as falling into two genera, namely, rights arising from contracts and rights arising not from contracts but from some existing relation between two specific persons or groups which relation is generally created by law. (Ibid. Sec. 95, page 123) and he says "this general classification embraces all primary rights and duties both legal and equitable which belong to the private civil law." (Ibid. page 124).

In Code remedies, Sec. 16, p. 28, the same author says:

> "The new system not only permits but encourages—and, in its spirit I believe requires—such a

union and combination (of legal and equitable actions); *for one of its elementary notions is that all the possible disputes or controversies arising out of or connected with the same subject matter or transaction should be settled in a single judicial action.*" (Emphasis added.) (See *Alexander vs. Hillman,* 296 U. S. 222, 80 L. Ed. 192-201).

"Each separate tort is the basis of a single cause of action, and but a single one, and all damages arising from a single wrong thereof at different times comprises but one cause of action."

(1 Cal. Jur. 2d p. 702).

"Rejecting, therefore, all those portions of the pleading which describe the remedy or relief demanded, the inquiry should be directed exclusively to the allegations of fact which set forth the primary right of the plaintiff and the wrong done by the defendant. If one such right alone, however comprehensive, is asserted and one such wrong alone, however complex, is complained of, but one cause of action is alleged." (Pomeroy Code Remedies, Sec. 351, pp. 537-539.)

With these principles in mind we return to the question whether there was an invasion of two primary rights or only one. Since no domestic relation is involved, we need not further consider those rights that arise out of such relation. We do have the relation of employer and employee. This is a contractual relation and clearly it is implied by the law that the employee will be faithful to the employer; or if we consider the relation as that of principal and agent, the duty of

fidelity is even more strongly implied and a breach of what is implied is as much a breach of the contract as what is expressed.

Sacramento Nav. Co. vs. Salz, 273 U. S. 326, 71 L. Ed. 663, 665;
4 Corbin on Contracts, Sections 944, 946.

"Any bargain by which an agent or other fiduciary receives or is promised any compensation or personal advantage in return for his advising or influencing his principal is illegal and fraudulent. Such fraudulent compensation usually comes from a third party who is dealing with the principal for whom the agent is acting."

6 Corbin on Contracts, Sec. 1457.

We contend that the primary right possessed by plaintiff arose out of the implication that its agent or trustee would act only for its interest in dealing with defendants; that the wrong consisted in a corrupt agreement between the defendant, Blades, and his co-defendants; that for that wrong the law has provided remedies commensurate with the injury inflicted; the wrongful acts done in pursuance of the conspiracy constitute the grounds of the action. (15 C.J.S. 1035.) And "all the facts which are material and necessary to constitute the cause of action relied on, such as for a conspiracy to defraud or injure business" should be alleged in ordinary and concise language. (15 C.J.S. 1034). The action sounds in tort (*Sterman vs. Ziem,* 17 Cal. App. 2d 414) and the plaintiff may sue the fidu-

ciary and the third party for damages on the conspiracy or he may sue the third party alone.

> *Sterman vs. Ziem,* 17 Cal. App. 2d 414-420;
> *Moropoulos vs. Fuller Co.,* 186 Cal. 679-687.

And conversely, we think the plaintiff may sue the third party and the fiduciary for damages or he may sue the fiduciary alone.

One thing more he can do, namely, he can waive the tort and sue *in assumpsit* upon the contract implied in law.

> *Hallidie vs. Enginer,* 125 Cal. at 508;
> *Philpott vs. Sup. Ct.,* 1 Cal. 2d 512-520.

But where the tort is of such a character as to afford the plaintiff the right to sue *in assumpsit,* the adoption of one remedy is a bar to the other. (Note 67 in 28 C.J.S. 1066, citing *Lilies vs. Texas Co.,* 117 So. 329, 166 La. 293; *Lilies vs. Fritz,* 117 So. 230, 166 La. 297; *Arnold Realty Co. vs. Wm. K. Toole Co.,* 115 Atl. 565, 44 R. I. 83).

We submit therefore that there has been but one primary right of plaintiff invaded by one wrong in which all these defendants participated and for all the results of which they are jointly and severally liable; that the damages to plaintiff consisted not only in the excessive payments but also in the loss of the faithful services of defendant Blades; that the loss of faithful services of Blades constitutes detriment (C. C. Sec. 3282) for which damages are recoverable (C. C. Sec.

3281; 3 C. J. S., Article Agency, Sec. 138; Sec. 286); and if by that breach of fidelity, money has come into the hands of the agent which the law does not permit him to retain although as in other cases where money has come into the hands of one which in good conscience belongs to another—although as a remedy for the antecedent wrong namely the trespass upon plaintiff's primary right—the law implies a contract to pay the principal the money wrongfully received, still that right is remedial only and may be resorted to in lieu of other remedies and when so resorted to is exclusive.

Therefore we say as to the cases cited by appellant on pages 11-23 of its brief, so far as they are in point here, are not sound in principle and ought not be followed. The law should not and does not burden the defrauded party with the necessity of maintaining a number of actions to obtain complete relief from one transaction.

Alexander vs. Hillman, supra.

II.

THE LAPSE OF TIME HAS BEEN SO GREAT AS TO GIVE RISE TO THE PRESUMPTION THAT EVIDENCE HERETOFORE AVAILABLE TO THE DEFENDANTS IS NO LONGER AVAILABLE.

If the court did not take judicial notice of the fact that plaintiff is a gigantic corporation possessing great resources and an organization correspondingly great, there is enough pleaded to warrant an inference of those facts. It is a New York corporation engaged in selling general merchandise in retail stores and by mail. It has a Los Angeles group of stores that paid to these defendants for engravings to be used in its advertisements for the Los Angeles group in a little less than ten years over half a million dollars. Other facts indicating somewhat the magnitude of its operation are that Blades was advertising manager for the Los Angeles stores only. It is a fair inference that each other group of stores also had an advertising manager; that the services of the advertising managers of other groups were at all times available to the management of the Los Angeles group; and that the advertising managers of other groups were as familiar with the formulas and techniques for computing rates for engraving work as defendant Blades.

It is not, and cannot be alleged that during the long period of time plaintiff made payments without knowledge of the respective amounts and the basic rate charged. It appears affirmatively that it now possesses

the knowledge that the "market price" for such engravings was, from the formation of the conspiracy down to the present time, $.030 per unit or less. If it now knows the market price of such engraving for the remote years following the inception of the conspiracy it must have known the fact at the time of payment and there is no allegation to the contrary.

It knew the market price; it knew the amounts being paid, and it had within its organization other men than Blades through whom it could have learned that the price being paid by it was excessive. Yet for fifteen long years it continued to make such payments without investigation or complaint.

As the result of this long delay it is no longer able to allege the facts positively and does not now know the total amount it paid to these respondents and must rely on them to furnish the necessary information (Comp. par. VIII, R. p. 10). It does not know but only is informed and believes that the amount paid to these respondents was in excess of the fair market price (Ibid). The amount of such excess is now unknown to plaintiff but it is informed and believes that the same is well known to defendants. (Ibid. R. p. 8).

If the plaintiff, with its organization, no longer knows the facts constituting the gravamen of its claims as the latter relates to these bygone years, is it reasonable to suppose the defendants are in any better situation as to the facts constituting their defense? Since that remote period the greatest war of all time has been fought; nations have disappeared from the map; the

greatest destructive agency ever discovered by man has been used with devastating force; one by one medical science has recorded its victories over the most dreaded disease; new occupations have claimed the energies of man, and there has been added to the City of Los Angeles an additional population of metropolitan size and character. It is unreasonable to suppose that the situation of the defendants has remained unchanged during this period.

In the ordinary course of business employees have died or moved away; documents once available have been lost; memories have been blunted by the lapse of time, and there has arisen a presumption that plaintiff had full knowledge of the facts of which it now complains, acquiesced in the receipt by Blades of the four hundred dollar payments and was willing to pay these respondents their charges for their promptness, skill and efficiency.

Suhr v. Lauterbach, 164 Cal. 591-593;
Title Ins. Co. v. Cal. Dev. Co., 171 Cal. 173-218;
McGibbon vs. Schneidt, 172 Cal. 70-74;
Wolpert vs. Gripton, 213 Cal. 474;
Allen vs. California Bldg. Assoc., 22 Cal. 2d 474, 482, 483;
Goodfellow vs. Barrett, 130 Cal. App. 548-560, 561;
Cahill vs. Sup. Ct., 145 Cal. 42, 47;
McKee vs. McKee, 154 Kan. 340, 118 Pac. 2d 544, 137 A.L.R. 880, 883;

Wells Fargo Nat. Bank vs. Barnett, 288 Fed. (9th Circuit) 683, 43 A.L.R. 906-919;
Godden vs. Kimmell, 99 U. S. 206, 25 L. Ed. 431, 434.

"But there is a defense peculiar to the courts of equity founded on lapse of time and the staleness of the claim where no statute of limitations governs the case. Such courts in such cases often act on their own inherent doctrine of discouraging for the peace of society antiquated demands by refusing to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse claims. (Citing cases).

"Authorities to support that proposition are numerous and decisive, nor is it necessary to look beyond the decisions of this court for the purpose. Lapse of time, said Mr. Justice Thompson, and the death of the parties to the deed have always been considered in a court of chancery entitled to great weight and almost controlling circumstances where the controversy grows out of State transactions."

Godden vs. Kimmell, supra, 21 L. Ed. at 434.

There is grave danger after the lapse of so long a time in relying "on the frail memory or active imagination of ancient witnesses who may not be able after a great lapse of time to distinguish between their faith and their knowledge, between things seen and heard by themselves, and those received from family or neighborhood gossip, or that most unsafe of all testi-

mony, conversations and confessions—remembered or imagined—partially stated or wholly misrepresented."

Badger vs. Badger, 2 Wall. 87, 17 L. Ed. 836, 838.

In *Prevost vs. Gratz,* 5 L. Ed. 481 at 496, the Court said:

". . . But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence, and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that can fairly be expected in such cases, if the parties are living, from the frailty of memory, and human infirmity, is, that the material facts can be given with certainty to a common intent; and, if the parties are dead, and the cases rest in confidence, and in parol agreements, the most that we can hope is to arrive at probable conjectures, and to substitute general presumptions of law, for exact knowledge. Fraud, or breach of trust, ought not lightly to be imputed to the living; for, the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evi-

dence of fraud be clear, beyond a reasonable doubt."

So, we say there has been here such a lapse of time as to raise a presumption against the imputation of fraud.

Nothing can call a court of equity into activity but conscience, good faith and diligence.

McKnight vs. Taylor, 11 L. Ed. 86, 88;
Millers Heirs vs. McIntyre, 31 U. S. 61, 8 L. Ed. 320;
McQuiddy vs. Ware, 20 Wall. 14, 22 L. Ed. 311;
Howard vs. Societa Di Italiana, 62 Cal. App. 2d 842-851;
Chaplin vs. Sullivan, 67 Cal. App. 728-737;
Humphreys vs. Walsh, 248 F. 414, 419.

The further division of labor; the broader fields occupied by industry and commerce; the greater number of people who live in apartment houses or purchase homes on installments with only small payments, are conditions which have resulted in recent years in a more rapid shifting of population and more extensive accumulation of business records. The probability, therefore, of evidence becoming lost during the last 15 years by reason of the removal of people who know the facts to different locations, and by records having become so voluminous that the older records have necessarily been lost or destroy, is greater than during any previous period. Indeed, when the plaintiff has been obliged in its pleading to admit that it no longer

knows facts necessary to entitle it to the relief demanded, by that admission it gives strong emphasis, indeed almost to certainty, that what has happened to amounting indeed almost to certainty, that what has happened to it with its greater resources has happened to a greater extent to these respondents.

III.

THE QUESTION OF LACHES IS ADDRESSED PRIMARILY TO THE TRIAL COURT AND IN THE ABSENCE OF A SHOWING THAT HE ABUSED HIS DISCRETION, HIS DECISION WILL NOT BE DISTURBED.

Undoubtedly what constitutes laches is to be determined in the light of the circumstances of each particular case. There is no absolute rule as to what constitutes laches or staleness of demand, and no one decision constitutes a precedent in the strict sense for another, but each case is to be determined according to its own particular circumstances.

30 C. J. S. 525;
Cleveland Clinic Foundation vs. Humphreys, 97 F. 2d 849;
The Kermit, 70 Fed. 2d 363, 367; (9th Cir.)
Lawson vs. O'Brien, 90 F. 2nd 792;
Robert Hind Limited vs. Silva, (9th Cir.) 75 F. 2nd 74-78;
D. O. Haynes & Co. vs. Druggists Cir. Co., 32 F. 2nd 215, 217;
Newport vs. Hatton, 195 Cal. 132, 147;

La Shells vs. Hench, 98 Cal. App. 6, 14, 15;
Davis vs. Schneider, 91 Cal. App. 631, 635;
Freeman vs. Donohoe, 65 Cal. App. 65, 93;
Pratt vs. Pratt, 43 Cal. App. 261;
Suhr vs. Lauterbach, 164 Cal. 591, 593, 594;
Akley vs. Bassett, 189 Cal. 625, 647, 648;
McMahon vs. Grimes, 206 Cal. 526, 540;
Chapman vs. Bank of California, 98 Cal. 155;
Wolff & Co. vs. Can. Pac. Ry. Co., 123 Cal. 535, 540;
Dufour vs. Weissberger, 172 Cal. 223, 225;
Carr vs. Sacramento Clay Products Co., 35 Cal. App. 439;
Calif. Bond Co. vs. Washburn, 94 Cal. App. 530, 532.

Other cases will be found in Footnote 42, 30 C.J.S. 528.

Since the question is addressed to the trial court the burden rests upon the plaintiff in such a case as this to allege such state of facts in the complaint as leaves no room for the question to be decided adversely to such plaintiff. It is for the trial judge to determine whether under the circumstances shown on the face of the complaint (or otherwise brought to the attention of the court) there is so strong a presumption that the evidentiary facts have become obscured to such an extent that it would be inequitable to permit the plaintiff to proceed. In making that determination the trial judge had a right to consider that it appears upon the face of the complaint "that the dates and amounts of

the purchases of engravings made by plaintiff from defendant 'Engravers' during the period of time from on or about January 1, 1937 until on or about February 5, 1942 . . . are not now known by the plaintiff. The trial court had a right to consider that the total amount so charged by said defendant 'Engravers' and paid by plaintiff for engravings purchased by plaintiff from said defendant 'Engravers' during said period of time from on or about January 1, 1937 until on or about February 5, 1942 are not now known by plaintiff.'' The court had a right to question the plaintiff's ability to prove that said total amount was in excess of the fair market price and value of the engravings and to determine that the information possessed by the plaintiff at this remote date is based ''on the frail memory or active imagination of ancient witnesses . . . not able after so long a lapse of time to distinguish between their faith and their knowledge.'' If there was nothing other than the lapse of time and this allegation in the plaintiff's complaint, these alone would be ample to warrant the trial judge in making a finding of laches and to relieve him from any imputation of having abused his discretion.

In *The Kermit,* 76 Fed. 2d 363, at 367, this Court having the question of laches before it, said:

> ''There is no absolute rule as to what constitutes laches or staleness of demand, and no one decision constitutes a precedent in the strict sense for another. Each case is to be determined according to its own particular circumstances. In other

words, the question of laches is addressed to the sound discretion of the chancellor, and his decision will not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion. In determining whether there has been laches, there are various things to be considered, notably the duration of the delay in asserting the claim, and the sufficiency of the excuse offered in extenuation of the delay, whether plaintiff acquiesced in the assertion of operation of the corresponding adverse claim, the character of the evidence by which plaintiff's right is sought to be established, whether during the delay the evidence of the matters in dispute has been lost or became obscured or the conditions have so changed as to render the enforcement of the right, inequitable, whether third persons have acquiesced intervening rights. . . ." 21 C. J. Sec. 217, pp. 217-219.

"Several conditions may combine to render a claim or demand stale in equity. If by the laches and delay of the complainant it has become doubtful whether adverse parties can command the evidence necessary to a fair presentation of the case on their part, as, for instance, where parties interested and witnesses have died in the interim, or if it appears that they have been deprived of any advantages they might have had if the claim had been seasonably insisted on, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief, but will remain passive; and this although the full time may not have elapsed which would be required to bar a remedy at law. . . . " 10 R.C.L. 400, Sec. 417.

> *"As the decisions indicate, the question of laches is addressed to the sound discretion of the trial judge, and his decision will not be disturbed on appeal* unless it is so clearly wrong as to amount to an abuse of discretion. In this case we cannot say that the lower court abused its discretion." (Emphasis ours.)

We think a stronger case is presented by the pleading in this case than was shown by the record in that one.

IV.

NO FIDUCIARY RELATIONSHIP EXISTED BETWEEN THESE RESPONDENTS AND THE PLAINTIFF, AND THE RULE OF DILIGENCE IS NOT RELAXED IN FAVOR OF PLAINTIFF FOR THAT REASON.

We have examined the cases cited by the appellant on page 41 of his brief. Without exception those were cases in which the action was brought only by one fiduciary against another. They have no application to the facts in this case. We note that demurrers were sustained in *Bainbridge v. Stoner,* 16 Cal. 2d 423, and *Lee v. Hensley,* 103 Cal. App. 2d 697. However, we contend that the cases do not sustain the doctrine laid down, namely, that lack of diligence of discovery is inapplicable to fraud, which has its inception in a fiduciary relationship. The true rule is that in such cases a lesser degree of diligence is required than where the relation does not exist. That diligence is required to make discovery, and neglect is not excused even though the fiduciary relationship exists, was held in *Phillips v. Carter,* 135 Cal. 599. To the same effect see *Hannigan v. Yolo Fliers Corp.,* 208 Cal. 697. The strongest of the cases cited in support of the proposition is *Hobart v. Hobart,* 26 Cal. 2d 412, but even that case, as we understand it, does not excuse neglect, but only relaxes the strict requirement of diligence. In other words, *the same degree of diligence* is not required where the transaction is between fiduciaries.

V.

THAT BY THE ACTION IN THE STATE COURT THE PLAINTIFF WAIVED THE TORT AND ELECTED TO SUE UPON AN IMPLIED CONTRACT IS BEYOND QUESTION.

The action in the state court was in *assumpsit* for money had and received. In his Code Remedies, Sec. 48, Mr. Pomeroy says:

> "The general classification being made of actions *ex contractu* and those *ex delicto,* there were many cases in which a party who had suffered a wrong by the conversion or the taking and carrying away of his chattels might waive the tort and bring an action of *assumpsit* upon the wrongdoer's implied promise to pay the price of the articles taken. The same election still exists."

In Sec. 387 the author says:

> "In certain cases the plaintiff is allowed an election to treat the wrong done as a tort or to waive the tort and sue as upon an implied promise of the defendant. When this is permitted a cause of action of such a nature in which the tort has been waived and the claim placed upon the footing of an implied promise may be joined with causes of action arising out of any other form of contract express or implied."

In Sec. 458 the author says:

> "Intimately connected with the questions last discussed as to the proper forms of actions and the

relation between the allegations and the proofs is the subject indicated by this heading: between actions *ex delicto* and actions *ex contractu,* that is, the power held by the plaintiff under certain circumstances of choosing whether he will treat his cause of action as arising from tort or from contract. This right of election sometimes occurs when the contract is express; but on account of the tortuous acts of the defendant the plaintiff may disregard it and sue directly for the wrong. In the great majority of instances, however, the contract invoked and made the basis of the suit is implied. But theory of the implied promise and its invention in order that certain classes of liabilities might be enforced by means of the action of *assumpsit* have already been explained. As the fictitious promise was implied or inferred by the law from actual omissions of the defendant which created a liability *ex aequo et bono.* It sometimes happens that these acts or omissions are tortuous in their nature. In such a case therefore, the liability could be regarded in a double aspect; namely, as directly springing from the tort committed by the wrongdoer or as arising from the promise to make compensation which the law implied and imputed to him."

In *Philpott v. Sup. Ct.,* 1 Cal. 2d 512, the Court traced the history of *assumpsit* and quoted from Page on Contracts, Vol. 3, pages 2510, 2512, as follows:

"If 'A' receives money which belongs to 'B' under circumstances which give 'A' no right thereto, but which bind 'B' on principles of justice and

> fairness to repay such money to 'B', the common law allowed 'B' to sue as on contract although there was no express contract and no real implied contract in order to prevent 'A's' unjust enrichment at 'B's' expense. This principle has survived in our law and an action as upon contract will lie for money had and received wherever one party has received money which belongs to another and which in 'equity and good conscience' or, in other words, in justice and right, should be returned. Since the contract alleged in the plaintiff's complaint is often purely fictitious, the plaintiff's right to recovery in a contract does not depend upon any principles of privity of contract between the plaintiff and the defendant, and no privity is necessary."

and in the same case (1 Cal. 2d 523) the Court quoted from *Steuerwald v. Richter,* 158 Wis. 597, 149 N.W. 692, as follows:

> "Although the action is legal in form the right to recover is in its nature equitable and can only be enforced where the defendant has received money which in equity and good conscience he ought to pay to the plaintiff."

Such money must necessarily be received because of some contractual relation between the parties, in which case there is a privity of contract, or it must be received as the result of some tortuous act, in which case the law implies a promise to pay the money although no privity of contract exists.

In order, therefore, for appellant's position to be sound, it must be necessary for Blades to have received the money other than by way of the commission of a tort, in which case there could be no such conspiracy as plaintiff has alleged.

We see no escape, therefore, from the conclusion that the implied contract upon which appellant sued in the state court was a contract implied by law to restore the proceeds of a fraudulent conspiracy. Certainly it was an action *ex contractu* according to all the authorities. (See *Philpott vs. Sup. Ct., supra; McCall vs. Sup. Ct.,* 1 Cal. 2d 527.)

It was an action arising out of the very fraud that is pleaded here. It was pleaded there to the end that the plaintiff might have the benefit of a writ of attachment, which it could not have if it sued in tort. By its bill of particulars the plaintiff admitted a suit in the state court for "secret profits received by defendant Frank R. Blades and on account of Sears-Roebuck & Co." In its complaint here it alleges that those secret profits were paid in the course of a conspiracy to defraud the plaintiff, for the consequences of which conspiracy all the conspirators are liable.

In the cases last above cited and in *Steiner v. Rowley,* 35 Cal. 2d 413, 420, it has been held that such actions were inconsistent.

CONCLUSION

We have not examined the cases cited on page 10 of Appellant's Brief, for we are in complete accord with them. We are not able to agree, however, that the state action against Blades did not arise out of a waiver of the tort. The money which came into his possession did so by reason of a course of wrongful conduct on his part. We are not here concerned with the case in which an employee lawfully acquired by virtue of his employment money in addition to his compensation, but we are concerned here with a case in which the very acquisition of the money was a fraud upon the employer. If Section 2860 of the California Labor Code had never been enacted, the plaintiff's rights under the circumstances of this case would be precisely the same.

In the concluding section of plaintiff's brief, Section 350 of Pomeroy's Code Remedies is quoted. We supply emphasis to the first word "*If* two separate and distinct primary rights *could* be invaded by one and the same wrong," his language indicating a doubt in the author's mind of such possibility existing. We have supplied emphasis to make this apparent.

The learned Judge of the court below reached a correct conclusion. The appellant has utterly failed to show any abuse of discretion and the judgment should be affirmed.

Respectfully submitted,

NATHAN M. DICKER
208 South Beverly Drive
Beverly Hills, California
Attorney for said Respondents.